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No. 97-0791

In The

Supreme Court of the United States

October Term, 1997

ROBERT BURCH,

Petitioner,

vs.

THE COCA-COLA COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The Fifth Circuit in this case applied well-established law to reach a predictable disposition: An employee who failed to prove that he was substantially limited in any major life activity at the time of his alcohol-induced misconduct or consequent termination is not entitled to recover under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213.

Petitioner Robert Burch ("Burch") produced insufficient evidence that "his alcoholism ever substantially impaired any major life activity," that he was an individual with a record of such an impairment, or that his employer, respondent The Coca-Cola Company ("Coca-Cola"), ever regarded him as so limited. Appendix to Petition for Writ of Certiorari ("Pet. App.") at 35a-39a. The absence of such evidence not only defeats Burch's reasonable accommodation and intentional discrimination claims on the merits, but also disposes of all claims addressed in the Petition. The Fifth Circuit did not require Burch to demonstrate a "secondary impairment," as Burch contends, but merely required *some* impairment that rose to the level of a substantial limitation, as the ADA plainly requires and as every circuit to examine the issue has concluded. This commonplace fact-specific determination presents no issue worthy of this Court's review.

Nor did the Fifth Circuit break new ground in holding that Burch's termination for his admittedly inappropriate on-the-job conduct, while intoxicated, was not a denial of reasonable accommodation. In enacting the ADA, Congress promised employers that they could discharge anyone, including alcoholics, for alcohol-related misconduct. As

Burch himself explains, "employers are permitted to hold an alcoholic to the same qualification standards for employment or job performance and behavior that it [*sic*] holds other employees, even if any unsatisfactory performance or behavior is related to alcoholism. 42 U.S.C. § 12114(c)(4)." Pet. at 19. Burch did not seek a reasonable accommodation for his alleged disability; he sought reinstatement following his work-related misconduct while intoxicated. Burch is able to conclude that the Fifth Circuit's decision is in conflict with the decisions of other federal circuits only by mischaracterizing the Fifth Circuit's holding on reasonable accommodation. The Fifth Circuit concluded — correctly, and consistently with other circuits — that employers have the right to terminate, rather than reinstate, following alcohol-induced misconduct. There is nothing more to this case.

ARGUMENT

I. The Fifth Circuit's Holding That Alcoholics (Like Anyone Else Seeking ADA Protection) Must Prove a "Substantial Limitation of a Major Life Activity" Is Consistent with the Law in Every Federal Circuit

The Fifth Circuit's decision is not a "portentous deviation from the clear language of the statute and established precedent," Pet. at 13, but a careful application of the statute and the regulations to a particular set of facts. Every other circuit has applied the ADA in precisely the same manner, and has reached decisions that are fully consistent with this one.

The Fifth Circuit did *not* hold, as Burch contends, "that for alcoholism to be an actionable disability under the ADA, an individual must demonstrate, in addition to his alcoholism, a permanent secondary impairment caused by the alcoholism." Pet. at 13. Rather, the court applied the statute by its terms, holding that ADA coverage arises only if an employee's alleged impairment — here, alcoholism — in fact "substantially limits one or more of the major life activities of such individual," or the individual has "a record of such impairment" or is "regarded as having such an impairment." 42 U.S.C. § 12102(2). *See* Pet. App. at 17a, 35a. *See also* 29 C.F.R. § 1630, App. (1997) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."). Every circuit has engaged in such fact-specific analyses: An ADA plaintiff must demonstrate an actual substantial limitation (or the record or perception of one).[1]

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1 *See Castle v. Bentsen*, 867 F. Supp. 1 (D.D.C. 1994) (demonstrating disability requires "more than a showing that the plaintiff has a blood condition"; rather, plaintiff must present evidence that the condition substantially limits a major life activity), *aff'd*, 78 F.3d 654 (D.C. Cir. 1996); *Stewart v. County of Brown*, 86 F.3d 107, 111 (7th Cir. 1996) (plaintiff diagnosed as suffering from depression, and whose employer "considered [him] to be emotionally or psychologically imbalanced [and] temperamentally unfit to serve as a sheriff's deputy," produced insufficient evidence to demonstrate that the employer perceived the depression as substantially limiting); *Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1354 (9th Cir. 1996) (plaintiff's four-month "psychological reaction" to bladder cancer "had no long-term residual effects" and was "not of sufficient duration to fall within the protections of the ADA as a disability."), *cert. denied*, 117 S. Ct. 1247 (1997); (continued)

The Fifth Circuit sifted methodically through the trial record for evidence to support Burch's "assertion that his alcoholism made him a 'qualified individual with a disability,'" Pet. App. at 18a, but found none. The court concluded that "there is insufficient evidence in the record to support a jury finding that Burch ever suffered a substantial impairment of a major life activity, much less that he did so on or after October 27, 1993," *id.* at 24a, a date preceding his termination. Nor was there sufficient evidence that he had a record of such a limitation or that Coca-Cola regarded him as

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Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 14-17 (1st Cir. 1997) (engineer who suffered from a life-long dysthymic disorder was not substantially limited in a major life activity even though he was unable to get along with others); *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 718-20, 724 (2d Cir. 1994) (discharged plaintiff whose asthma was exacerbated by air in workplace and precluded her continued employment there was not a person with a protected disability "[b]ecause her asthmatic condition did not substantially limit a major life activity — either her ability to breathe or work"), *cert. denied*, 513 U.S. 1147 (1995); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 884 (6th Cir. 1996) ("[a]lthough both arthritis and MS can be disabling in some instances, they were not so substantially limiting in this case."); *Aucutt v. Six Flags Over Mid-Am., Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996) (plaintiff, who suffered from angina, high blood pressure, and coronary artery disease, failed to present sufficient evidence to establish that he was substantially limited in any major life activity given that the only limitation resulting from his medical condition was a 25-pound lifting restriction and difficulty completing an employee obstacle course).

so limited. *Id.* at 35a, 39a.[2] This fact-specific determination raises no legal issue of importance to this Court.

The Fifth Circuit made no blanket pronouncement about alcoholism. To the contrary, the court properly observed that "[t]his is not to say that an alcoholic can never demonstrate a substantially limiting impairment." *Id.* at 21a n.9. But the court found "no evidence in the legislative history or elsewhere of a congressionally conferred exemption for alcoholics from the rigors of the scheme set forth in the ADA." *Id.* at 25a n.10. The decision is unquestionably correct and consistent with the law of every circuit.[3]

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2 These conclusions are hardly surprising. The robust 6'5," 223-pound Burch

> offered no testimony that his alcoholism-induced inebriation permanently altered his gait, his ability to speak properly, his memory when sober, or produced long-term insomnia. In fact, when Burch began treatment for his alcoholism in late September 1993, he reported to Charter Hospital that he had been bicycling recreationally between 100 and 200 miles a week. Burch concedes that, prior to his paid leave to undergo treatment, his work was unaffected by his alcoholism. Burch testified that he never drank during working hours.

Pet. App. at 21a n.9. Although Burch states that "[h]e had blackouts when drinking and suffered from insomnia and depression," Pet. at 7, the record is devoid of proof as to when and how frequently that occurred.

3 Burch cites *School Board v. Arline*, 480 U.S. 273, 279-81 (1987), a pre-ADA case under the Rehabilitation Act, for the proposition that hospitalization is sufficient to establish a substantial limitation of a major life activity under the ADA. That is plainly not the law. EEOC (continued)

Burch makes the misleading assertion that "[e]very other circuit court case which has dealt with the disability of alcoholism under the ADA and the Rehabilitation Act has treated, without question, or assumed, that a person suffering from the disease of alcoholism is an individual with a disability or a handicap." Pet. at 17. Many of the decisions he cites have *assumed* that alcoholism is a covered impairment,[4] but not one case has held, or even intimated, that a plaintiff whose alcoholism does not substantially limit a major life activity is covered by the ADA.[5]

Compliance Manual § 902.4(d) ("[t]he mere fact that an individual may require . . . hospitalization" or even "the necessity of surgery" does not automatically mean the condition is a disability); *Demming v. Housing & Redev. Auth.*, 66 F.3d 950, 955 (8th Cir. 1995) (hospitalization for thyroid cancer not enough to establish disability); *Taylor v. United States Postal Serv.*, 946 F.2d 1214, 1217 (6th Cir. 1991) (*Arline* should not be read "as establishing the nonsensical proposition that any hospital stay is sufficient to evidence a 'record of impairment'" under the Rehabilitation Act.).

4 *Maddox v. University of Tenn.*, 62 F.3d 843, 846 (6th Cir. 1995) ("[W]e assume, without deciding, that alcoholics *may* be 'individuals with a disability' for purposes of the Act."; summary judgment for employer affirmed) (emphasis added); *Altman v. New York City Health & Hosps. Corp.*, 100 F.3d 1054, 1060 (2d Cir. 1996) (no analysis of "substantially limited" issue; affirming summary judgment for employer on alcoholic's claim because plaintiff was not "qualified"); *Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir. 1996) (affirming grant of motion to dismiss; misconduct bars ADA claim; no discussion of whether plaintiff was substantially limited in a major life activity).

5 Several of Burch's citations have no instructive value because they arose before the effective date of the 1992 amendments to the Rehabilitation Act. Those amendments eliminated an earlier requirement (continued)

Rather, the courts in the cases Burch cites essentially pretermitted the issue of disability and held in favor of the *employer* on a ground that defeats Burch's case as well: An alcoholic who engages in inappropriate conduct resulting from drinking is not excused from the consequences of the misbehavior because of a disability. *Teahan v. Metro-North Commuter R.R.*, 80 F.3d 50, 51-53 (2d Cir. 1996) (court found "not otherwise qualified" a drug and alcohol abuser, who had a history of absenteeism that he attributed to substance abuse, sought help from the employee assistance program for that problem, entered a voluntary inpatient rehabilitation program, and was notified of employer's intent to discharge for excessive absenteeism while he was in that program); *Maddox v. University of Tenn.*, 62 F.3d 843, 847 (6th Cir. 1995) (assistant football coach arrested for driving under the influence of alcohol while off duty, and terminated while enrolled in an alcohol rehabilitation program and on paid administrative leave, states no claim under the ADA; "to hold otherwise, an employer would be forced to accommodate all behavior of an alcoholic [employee] which could in any way be related to the alcoholic's use of intoxicating beverages").[6]

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to give alcoholics an option for treatment. *See Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980); *Tinch v. Walters*, 765 F.2d 599 (6th Cir. 1985); *Crewe v. United States Office of Personnel Management*, 834 F.2d 140 (8th Cir. 1987); *Rodgers v. Lehman*, 869 F.2d 253 (4th Cir. 1989); *Fuller v. Frank*, 916 F.2d 558 (9th Cir. 1990).

6 *See also Johnson v. New York Hosp.*, 96 F.3d 33, 34 (2d Cir. 1996) (alcoholic who came to the hospital in an intoxicated state during his vacation properly terminated; "Numerous courts have considered off-duty drunken conduct in determining whether the plaintiff was protected (continued)

II. Burch Seeks Certiorari Based on a Mischaracterization of the Fifth Circuit's Decision Regarding Reasonable Accommodation; The Court Held Only That a Request for Reinstatement Is Not a Request for an Accommodation

The Fifth Circuit had no need to reach the question of reasonable accommodation because Burch had failed to produce sufficient evidence to demonstrate that he suffered a disability requiring ADA protection. Nonetheless, the court also concluded that Coca-Cola could not be held liable for failing to accommodate Burch because Burch never asked for an accommodation — he asked only to return to work following termination for cause:

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under the Rehabilitation Act. . . . To turn a blind eye towards such conduct is justified neither by logic nor sound policy."); *Little v. FBI*, 1 F.3d 225, 259 (4th Cir. 1993) ("[B]ased on no lesser authority than common sense, it is clear that an employer subject to the Rehabilitation Act must be permitted to terminate its employee on account of egregious misconduct, irrespective of whether the employee is handicapped."); *Butler v. Thornburgh*, 900 F.2d 871, 876 (5th Cir.) (affirming trial court's dismissal of a claim by an alcoholic FBI agent), *cert. denied*, 498 U.S. 998 (1990); *Graehling v. Village of Lombard*, 58 F.3d 295, 296, 299 (7th Cir. 1995) (firing an individual whose alcoholism interfered with his job did not violate the law); *Despears v. Milwaukee County*, 63 F.3d 635, 637 (7th Cir. 1995) (employer not required to overlook drunk driving by an alcoholic); *Newland v. Dalton*, 81 F.3d 904, 905 (9th Cir. 1996) (termination for "disgraceful conduct" caused by alcoholism not a violation of Rehabilitation Act); *Williams v. Widnall*, 79 F.3d 1003, 1007 (10th Cir. 1996) ("[T]he [ADA] does not protect alcoholics or drug addicts from the consequences of their misconduct. . . ;" employer's decision to terminate before alcoholic had undergone "inpatient treatment for a sufficient period of time" is not a failure of reasonable accommodation) (citation omitted).

> Burch failed to establish that he ever requested any modification or adjustment to his job as an area service manager with Coca-Cola. A wrongful termination claim under the ADA is not properly analyzed under a reasonable accommodation theory unless an employer is shown to have terminated a qualified individual with a disability in order to avoid accommodating that employee's impairments at the workplace.
>
> Accordingly, an employee who requests only the opportunity to return to an unmodified, previously-held position fails to state a cognizable claim under 42 U.S.C. § 12112(b)(5).

Pet. App. at 15a-16a.

Confronted with an employee who blamed his misconduct on his alleged disability,[7] the Fifth Circuit held

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7 Burch did not simply "mouth[ ] obscenities" at another manager. Pet. at 8. Burch had the leadership responsibility for a Coca-Cola dinner meeting of 35 managers from around the country. RT 831:10-15; 1336:14-1337:1. He testified at trial: "I had consumed alcohol . . . and I got upset and I lost my temper." RT 226:6-7. Burch explained that, after a co-worker insinuated that Burch's manager would like him transferred, he pointed to manager Jerry Allen with his finger, mouthed "f--k you" to him twice, then mouthed "get off my ass," and motioned that he wanted to take it outside. RT 293:16-294:5; 401:19-402:4; 402:13-14; 408:22-409:2. Burch described himself as "red in the face" and "very angry." RT 294:16. Co-workers sitting near him urged Burch to "calm down." RT 295:3-4; 402:23-403:3; 403:9-11. An eyewitness testified: "Burch was enraged. He was out of control. . . . (continued)

that Burch's request for reinstatement after his September 22nd rage attack was a request for a second chance, not a request for a reasonable accommodation. This obvious conclusion is consistent with that of other courts under similar circumstances.

The plaintiff in *Siefken v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995), a police officer, claimed that he suffered a diabetic reaction while in his squad car, causing him to drive erratically and at high speeds through residential areas. The police department subsequently placed him on administrative leave and then terminated him for "failure to alertly and accurately keep [himself] functional and monitor [his] disease." *Id.* at 666. Siefken claimed that, after the incident, he received instruction on how to control his blood sugar and he represented that he would not experience a similar loss of control in the future. Siefken contended that his termination was a denial of reasonable accommodation.

The Seventh Circuit explained that Siefken's requested accommodation — a second chance after treatment — simply was beyond the scope of the ADA:

He was very, very angry, and it made me afraid being there. . . . I thought he wanted to fight Jerry Allen, and anybody . . . that would have been in the way of the two of them would have been at jeopardy." RT 1275:20-23; 1277:15-25. Burch thereafter directed "a very vivid stare . . . just livid with anger" toward Allen for minutes. RT 1278:10-24. Another witness testified, "I had never seen anything like that before in a business setting. . . ." RT 1261:6-7.

> When asked what accommodation Siefken would request, his counsel replied, "A second chance." But this is not an accommodation, as envisioned in the ADA. . . . Siefken is not asking the [employer] to change anything. He is asking for another chance to allow *him* to change his monitoring technique. But the ADA does not require this.

Id. at 666-67. To the same effect are *Fuller v. Frank*, 916 F.2d 558, 562 (9th Cir. 1990) (if an employer were required to await the outcome of an alcohol treatment program before terminating for misconduct, or reinstate following leave, "an employee could conceivably forestall dismissal indefinitely by repeatedly entering treatment whenever dismissal becomes imminent"); *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) ("An accommodation is something concrete — some specific action required of the employer. . . . [A]sking for a 'second chance' is not an ADA 'accommodation.'"); and *Brundage v. Hahn*, 57 Cal. App. 4th 228, 239-40 (1997) (reasonable accommodation does not include either "excusing a failure to control a controllable disability" or a second chance to control it in the future; "The ADA does not mandate giving a second chance to an employee. . . ."). As Burch's reasonable accommodation claim is nothing more than a request for a second chance, the Fifth Circuit properly ordered judgment entered for Coca-Cola.

Burch seeks to avoid this obvious conclusion — and create an issue for this Court where there is none — by twice recasting the Fifth Circuit's holding on reasonable accommodation. First, Burch takes out of context the Fifth Circuit's statement that Burch's accommodation claim

required him to "demonstrate that a substantially limiting impairment somehow affected his ability to perform his job." Pet. App. at 16a n.4. *See* Pet. at 23. The Fifth Circuit's dictum stands only for the obvious proposition that a reasonable accommodation plaintiff must show that the alleged disability requires some change in working conditions; otherwise, "there would be nothing for an employer to accommodate." Pet. App. at 16a n.4.[8] *See also id.* at 14 a – 15a. The only change Burch requested was that Coca-Cola reverse its decision to discharge him for cause. This is not a reasonable accommodation.

Second, Burch claims that the Fifth Circuit held that leave is not a reasonable accommodation for the disability of alcoholism. Pet. at 27. The Fifth Circuit reached no such conclusion. To the contrary, the court expressly declined to address that issue because Burch's request for reinstatement was not a request for leave:

> Burch does not complain that Coca-Cola ever denied a prospective request for a leave of absence. We therefore have no need to address whether an employer would be required, in certain circumstances, to offer a

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[8] This rule is consistent with each of the decisions forming Burch's alleged circuit split on this issue; in each of those cases the plaintiff asked for some change in working conditions. *Homeyer v. Stanley Tulchin Assocs.*, 91 F.3d 959 (7th Cir. 1996) (change in environment to minimize effects of tobacco smoke); *McWright v. Alexander*, 982 F.2d 222 (7th Cir. 1992) (child-care leave for adoptive mother where employer granted such leave to biological mothers); *Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir. 1993) (transfer).

> leave of absence to an employee whose alcoholism qualified as a disability under the ADA.

Pet. App. at 28a n.12.[9]

In fact, prior to Burch's termination, The Coca-Cola Company *did* grant him a leave of absence for treatment. Beginning September 27, 1993, Burch was given the full leave he requested and "remained on full salary throughout his treatment (which was paid for by Coca-Cola's benefit plan) and until his termination." Pet. App. at 10a. Effective November 5, 1993, Burch was released from treatment. RT 675:14-21. According to his own doctor, Burch was not substantially limited in working or any major life activities at that time. RT 697:4-18. Within a day of his release from treatment, Burch was informed that his employment was terminated because of his unacceptable behavior. RT 237:17-18; 1347:12-21. Burch's request to return to work under these circumstances was not a request for leave of absence.

Nothing in the ADA precludes an employer from terminating an employee on alcohol rehabilitation leave for conduct that occurred prior to the leave. *E.g., Teahan v. Metro-North Commuter R.R.*, 80 F.3d 50, 51-53 (2d Cir. 1996); *Maddox v. University of Tenn.*, 62 F.3d 843, 847 (6th Cir. 1995). Contrary to Burch's assertion, leave for

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9 *See also id.* at 24a ("Under different circumstances – and additional evidentiary support — an alcoholic may establish the need for reasonable accommodation of an alcoholism-induced impairment. Burch simply has not done so.").

treatment does *not* "necessarily impl[y] being able to return after the treatment is complete." *See* Pet. at 28.

The Fifth Circuit's unremarkable holding that an employee need not be reinstated following admitted misconduct, even if the misconduct was caused by a disability, raises no issue for this Court.[10]

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10 This case is inappropriate for review also because the Fifth Circuit would have rejected the jury verdict even if the court had not reached the conclusions to which Burch objects in his Petition: "[E]ven had Burch's case not suffered from the evidentiary deficiencies we find dispositive, a jury's verdict so grossly excessive as this would most probably warrant a new trial. . . ." Pet. App. at 32a n.15.

Moreover, the Court has no reason to hold this Petition pending the disposition of *Bragdon v. Abbott*, No. 97-156, (*cert. granted* November 26, 1997), an ADA Title III public accommodation case. The principal issues in *Bragdon* are whether asymptomatic HIV-positive status is a disability and whether reproduction is a major life activity. Burch's alcoholism implicates neither issue. The statute, regulations and decisions of all circuits require a two-step analysis to determine whether a claimant has a covered disability. The threshold inquiry is whether the individual has a physical or mental impairment. If so, the second inquiry is whether that impairment "'substantially limits one or more major life activities of such individual.'" Pet. App. at 17a, 19a (citing 42 U.S.C. § 12102(2)(A)). The Fifth Circuit properly concluded that even if Burch's alcoholism was an impairment, he failed to satisfy the second prong of the disability analysis in this case because he did not prove that it was a "substantially limiting impairment" of a major life activity. *Id.* at 20a-21a. General rules about HIV-positive status that the Court may establish in *Bragdon* will have no bearing on the present fact-specific holding.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of certiorari.

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